1999

Dee Blain v. Wal-Mart Stores, Inc. : Brief of Appellant

Utah Court of Appeals

Stephen G. Morgan, Mitchell T. Rice; Morgan, Meyer, Rice; Attorneys for Appellee.
G. Steven Sullivan, Robert J, Derby and Associates; Attorneys for Appellant.

G. STEVEN SULLIVAN - A3870
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE UTAH COURT OF APPEALS

DEE BLAIN, Plaintiff/Appellant, vs. WAL-MART STORES, INC., a Delaware Corporation, Defendant/Appellee.	No. 990235-CA Priority No. 15

BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM AN ORDER OF SUMMARY JUDGMENT GRANTED TO THE DEFENDANT/APPELLEE BY THE FOURTH JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM B. BOHLING PRESIDING

ORAL ARGUMENT REQUESTED

G. STEVEN SULLIVAN - A3870
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915
Attorneys for Appellant

STEPHEN G. MORGAN, ESQ.
MITCHELL T. RICE, ESQ.
MORGAN, MEYER & RICE
136 South Main Street, #800
Salt Lake City, UT 84101
Attorneys for Appellee

G. STEVEN SULLIVAN - A3870
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE UTAH COURT OF APPEALS

DEE BLAIN, Plaintiff/Appellant, vs. WAL-MART STORES, INC., a Delaware Corporation, Defendant/Appellee.	No. 990235-CA Priority No. 15

BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM AN ORDER OF SUMMARY JUDGMENT GRANTED TO THE DEFENDANT/APPELLEE BY THE FOURTH JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM B. BOHLING PRESIDING

ORAL ARGUMENT REQUESTED

G. STEVEN SULLIVAN - A3870
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Telephone: (801) 262-8915
Attorneys for Appellant

STEPHEN G. MORGAN, ESQ.
MITCHELL T. RICE, ESQ.
MORGAN, MEYER & RICE
136 South Main Street, #800
Salt Lake City, UT 84101
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (CONT'D)

Statutes **Page**

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in case number 990558-CA pursuant to Utah Code Ann. § 78-2-2 (1996). The Utah Court of Appeals has jurisdiction of case number 990235-CA by order of the Utah Supreme Court, dated April 28, 1999, transferring the case to this court. The two cases have been consolidated pursuant to an order of this court dated August 27, 1999.

STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting the Defendant's Motion for Summary Judgment where the Plaintiff was not required by Utah law to attach copies of the pages of the depositions to which she referred in her Memorandum in Opposition to Defendant's Motion for Summary Judgment to that document.

The trial court's ruling granting Defendant's Motion for Summary Judgment appears at pages 0177-0175 in the Record.

As in any appeal involving only a question of law, this court reviews the trial court's decision on a motion for summary judgment by applying the same standard applicable in the trial court. *English v. Kienke*, 774 P.2d 1154 (Utah Ct. App. 1989), *aff'd*, 848 P.2d 153 (Utah 1993). Thus, this court does not defer to the trial court's determination of whether there are disputed material facts but instead reviews the facts and inferences in the light most

favorable to the losing party, resolves any doubts or uncertainties in the favor of that party, and determines whether a genuine question of material fact was presented. *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933 (Utah 1997); *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991); *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah Ct. App. 1992).

2. Whether the trial court erred in granting the Defendant's Motion for Summary Judgment where the evidence contained in the deposition pages attached by the Defendant to its Memorandum of Points and Authorities in Support of the Summary Judgment Motion and its Reply Memorandum established that a material question of fact as to the Defendant's negligence existed. Similarly, whether the trial court erred where it was undisputed that the woman Freeman saw talking to the store manager was not the Plaintiff and thus Plaintiff was not required to provide evidentiary support for that fact.

The trial court's ruling granting Defendant's Motion for Summary Judgment appears at pages 0177-0175 in the Record.

As in any appeal involving only a question of law, this court reviews the trial court's decision on a motion for summary judgment by applying the same standard applicable in the trial court. *English v. Kienke*, 774 P.2d 1154 (Utah Ct. App. 1989), *aff'd*, 848 P.2d 153 (Utah 1993). Thus, this court does not defer to the trial

court's determination of whether there are disputed material facts. Instead, this court reviews the facts and inferences in the light most favorable to the losing party, resolves any doubts or uncertainties in the favor of that party, and determines whether a genuine question of material fact was presented. *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933 (Utah 1997); *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991); *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah Ct. App. 1992).

3. Whether the trial court abused its discretion by failing to grant Plaintiff's motion under Utah R. Civ. P. 60(b) where Plaintiff's failure to attach copies of deposition pages on which she relied in her Memorandum in Opposition to Defendant's Motion for Summary Judgment was based on a reasonable reading of the plain language of controlling Utah authority and where the absence of the copies did not in any way prejudice the Defendant.

The trial court's ruling denying Plaintiff's motion under Rule 60(b) appears at page 0211 in the Record.

This court reviews a trial court's decision on a motion under Utah R. Civ. P. 60(b) for an abuse of discretion. *See Larsen v. Collina*, 684 P.2d 52 (Utah 1984).

CONTROLLING RULES

Utah R. Civ. P. 56(e):

> (e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. P. 60(b):

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief

from a judgment shall be by motion as prescribed in these rules or by an independent action.

Utah R. Civ. P. 5(a)(1):

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

Utah R. Civ. P. 5(d):

(d) Filing. Except where rules of judicial administration prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service.

Utah R. Jud. Admin. 4-501(1)(A):

(1) Filing and service of motions and memoranda.

(A) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

Utah R. Jud. Admin. 4-501(2)(B):

> (B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Utah R. Jud. Admin. 4-502(4):

> (4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court except as provided in this Code or upon order of the court for good cause shown.

Utah R. Civ. P. 30(f)(1):

> (f) *Record of deposition; certification and delivery by officer; exhibits; copies.*
>
> (1) The transcript or other recording of the deposition made in accordance with this rule shall be the record of the deposition. The officer shall sign a certificate, to accompany the record of the deposition, that it was duly sworn and that it is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall securely seal the record of the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send the sealed record to be made. If any party in the action is not represented by an attorney, the record of the deposition shall be sent to the clerk of the court for filing unless otherwise ordered by the court. An attorney receiving the record of the deposition shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

STATEMENT OF THE CASE

This case arose from a fall Plaintiff suffered while she was shopping in Defendant's store in Orem, Utah. Plaintiff fell on liquid soap which had apparently spilled onto the floor from a bottle in the shopping cart of another customer. Defendant filed a motion for summary judgment, arguing that there was no evidence that it had constructive notice of the spilled soap for a sufficient time before Plaintiff fell for it to have cleaned the spill and thereby prevented the fall.

The trial court granted Defendant's Motion for Summary Judgment. (*See* R. at 1077-1075.) In his Memorandum Decision, Judge Ray M. Harding stated that he would not consider Plaintiff's arguments that certain facts were in dispute because Plaintiff had not attached copies of the pages of the depositions on which she relied to her opposing Memorandum. (*See* R. at 1076.) The trial court raised this matter *sua sponte*.

Plaintiff filed a motion to set aside the order granting summary judgment pursuant to Utah R. Civ. P. 60(b). (*See* R. at 0179.) The trial court denied the Plaintiff's motion. (*See* R. at 0211.) Plaintiff's notice of appeal from the order granting summary judgment was filed on May 26, 1999. (*See* R. at 0189.) That appeal was transferred from the Utah Supreme Court to the Utah Court of Appeals. (*See* R. at 0254.) The appellate court number in that matter is 990235-CA. (*See* R. at 0255.)

The two appeals were consolidated by Order dated August 27, 1999.

STATEMENT OF FACTS

Plaintiff Dee Blain was injured when she fell on a foreign substance on the floor of the Defendant's store while she was shopping. After she fell, Plaintiff remained on the floor for 10 to 15 minutes after she became aware of what was going on after the fall. (R. at 0083.) Plaintiff does not know if she lost consciousness when she fell but states that she "was stunned or something because" she does not remember hitting the floor. (R. at 0085.)

Plaintiff's daughter, Sheri Anderson, who was shopping with her, heard a Wal-Mart employee state that the substance on which her mother fell had been spilled from the back of the store, which occupied 110,000 square feet, to the front of the store. (R. at 0079.) She heard that statement a minute or so after her mother fell. (R. at 0079.) The statement was made while two female Wal-Mart employees, Anderson, and Troy Guevara, a Wal-Mart manager, were standing around Plaintiff, who remained on the floor. (R. at 0079.)

Melia Lei O'Hawaii White Freeman, the Wal-Mart employee who cleaned up the spill, was working in one of the store aisles when she saw a couple of spots on the floor. (R. at 0074.) She grabbed some paper towels and wiped up the spots that she saw. (R. at 0074.) As she wiped up those spots, she saw more spots. (R. at 0073.) This pattern continued until she reached the place where she believed Plaintiff had fallen. (R. at 0073.) When she reached the place where she believed Plaintiff had fallen, a store manager

was already there. (R. at 0073.) Freeman stated that, when she turned the corner from the aisle where she had been working and entered the main aisle in which Plaintiff had fallen, she saw that the spill "was something more than a couple little drops. But I had no idea." (R. at 0072.) Freeman testified that the drops she followed from the area in which she was originally working to the place where Plaintiff had fallen were part of the same spill. (R. at 0071.) Freeman also testified that it was "quite a ways" from the place where she first noticed the drops to the place where the Plaintiff fell. (R. at 0070.) She also stated that the area in which the spill occurred was a high traffic area. (R. at 0068.)

Freeman stated that frequently a spill will first be noticed by a customer, who will ask a Wal-Mart employee to clean it up. (R. at 0119.) Freeman stated that the instructions given to Wal-Mart employees regarding cleaning up spills were that the employee who found the spill should clean it up, or call to another Wal-Mart employee to clean it, or have a customer go get another employee. (R. at 0119.) Freeman testified that she would not leave a spill that had not been cleaned up. (R. at 0119.) On the day Plaintiff was injured, Freeman did not see any other employees as she was cleaning up the spill. (R. at 0119.)

When she was asked whether she requested a customer to summon another Wal-Mart employee to help with the spill, Freeman responded, "I didn't feel that it was necessary because I had the paper towels and it wasn't that—that great of a spill." (R. at 0118.) She further explained, "And if I—if I conversed with a

customer, then I probably would have gotten swarmed by some more customers asking me for something. Customers are always looking for somebody to help them. So I just stayed content on cleaning up what I could see." (R. at 0118.) She also stated:

> I may have even taken my smock off to clean it up so that nobody even knew I was a employee to stop me.
>
> Q. Is that something you would do now and then to avoid that problem?
>
> A. Sometimes, yeah, like if you had to get to do something. But I usually kept it in my back pocket. I never hid it. It was always there, and the employees knew who I was so—[.]

(R. at 0118.)

Freeman's testimony regarding the scene when she reached the area in which the manager was standing is as follows:

> Q. All right. Let me take you to that point for a moment. You mentioned to us as you came around the corner of that last aisle you saw—I guess you saw my client on the floor?
>
> A. Yeah. Well, no, I didn't see her on the floor. I saw her standing up.
>
> Q. All right.
>
> A. I got around the corner when she was standing there and talking to the manager.
>
> Q. But you were able to put together that she had fallen on the material?
>
> A. Yeah. Something—yeah. Something had happened for there to be a manager.

(R. at 0127.)

Freeman testified that she believed that the customer she saw talking to the manager was the same person who had caused the spill. Freeman thought she was also the person who had fallen and

been injured. (R. at 0126-0125.) Freeman stated that she saw this woman only when the woman was standing and talking to the manager. (R. at 0125.) Freeman did not see her in any other position. (R. at 0125.) Freeman testified that, once she approached the manager and the woman, she saw a dripping bottle in the woman's shopping basket. (R. at 0123.)

The Wal-Mart manager who spoke with Plaintiff immediately after she fell was Troy Guevara. He stated that the liquid on which the Plaintiff fell had come from a bottle which had been placed in a shopping cart by a customer who left a trail of liquid all through the store. (R. at 0147.) Guevara testified as follows:

> A. Well, I remember later, whoever it was that came up said, "Troy, I followed that thing all the way around the store."
>
> Q. Okay.
>
> A. And I said, "Wow, that's a pretty good spill."

(R. at 0145.) Guevara also testified that the spill was located in areas which Wal-Mart employees cross over "every five minutes or so." (R. at 0143.) He testified that he would have expected the employees to see the spill when they crossed the areas in which it was located. (R. at 0143.)

The pertinent portion of the trial judge's opinion is as follows:

> Plaintiff argues that it is disputed whether Defendant had knowledge of the spill before her fall since she testified in her deposition that she was still lying on the floor when she talked to Mr. Guevara and because Ms. Freeman's description in her deposition of the person she found standing and talking to Mr. Guevara

was obviously of another woman. However, the Court cannot consider these arguments since Plaintiff did not provide the Court with a copy of the portions of the depositions which allegedly contain these statements.

> [W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment. Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983).

(R. at 0176-0175.)

SUMMARY OF ARGUMENT

Plaintiff contends that the trial judge erred by ruling that he could not consider evidence contained on the pages of depositions to which the Plaintiff cited in her Memorandum in Opposition to Defendant's Motion for Summary Judgment because copies of those pages were not attached to that Memorandum. The plain language of several Utah rules establishes that copies do not have to be attached to documents such as Plaintiff's Memorandum. Nothing in the only case relied upon by the trial judge in support of his ruling or in the cases cited by the Defendant in support of that ruling in the briefings below support the judge's position. Thus, the trial judge erred in refusing to consider the evidence relied upon by the Plaintiff.

Furthermore, the trial judge ignored the fact that many of the pages referred to by the Plaintiff were also cited by the Defendant

in its Memorandum of Points and Authorities in Support of Motion for Summary Judgment and its Memorandum in Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment. The Defendant did provide copies of the pages to which it cited to the trial judge, and thus those pages were before the court. Plaintiff contends that, even if only the deposition pages referred to by the Defendant are considered, a material question of fact as to the Defendant's negligence is raised.

The Defendant has never claimed the woman Freeman saw talking to Troy Guevara was both the customer who caused the spill and the Plaintiff. Thus, there was no need for Plaintiff to present support for her contention that she was not the person Freeman saw talking to Guevara. The Defendant did not contest Plaintiff's statement that the description Freeman gave of the Plaintiff was clearly not the Plaintiff. In other words, the identity of the woman Freeman saw talking to Guevara was not contested. Plaintiff did not need to offer any support for her contention that she was not the woman Freeman saw talking to Guevara. (*See* Utah R. Jud. Admin. 4-501(2)(B) (requiring specific references to record in support of disputed facts)).

Plaintiff contends that the trial judge abused his discretion in failing to grant Plaintiff's motion under Utah R. Civ. P. 60(b). Recognizing that this court will rarely reverse a trial judge's decision because of an abuse of discretion, Plaintiff nevertheless contends that the exacting standard necessary for obtaining relief is met in this case. Several factual aspects of this case support

Plaintiff's position. First, Plaintiff contends that her reading of Utah law, which led her to believe that she was not required to attach copies of the deposition pages which she cited in her Memorandum in Opposition to Defendant's Motion for Summary Judgment was, at the very least, reasonable.

Furthermore, Defendant suffered no prejudice whatsoever from the absence of the page copies. Indeed, Defendant did not even object to the absence of the copies. The trial judge raised the matter *sua sponte*. The fact that Defendant used portions of the same depositions in support of its Motion for Summary Judgment illustrates that the Defendant had access to the depositions. If Defendant believed that Plaintiff had misrepresented any of the contents of the depositions, Defendant certainly would have called such alleged misrepresentations to the attention of the trial court before the Motion for Summary Judgment was ruled upon. Defendant never disputed any of the factual contentions which the Plaintiff made and supported with references to the depositions. Thus, even if the trial judge were correct in ruling that he could not consider matters which were not supported by copies of deposition pages, summary judgment was improper in this case and the motion for relief under Rule 60(b) should have been granted.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT. THE PLAINTIFF WAS NOT REQUIRED TO ATTACH TO HER MEMORANDUM COPIES OF THE DEPOSITION PAGES TO WHICH SHE REFERRED IN HER MEMORANDUM FOR THE TRIAL COURT TO THAT DOCUMENT.

This appeal arose from the trial court's ruling that it would not consider the Plaintiff's arguments that a factual question had been raised by the depositions because Plaintiff did not attach copies of the pages of the depositions on which she relied to her opposing Memorandum. (*See* R. at 0176-0175.) Plaintiff contends that she was not required to attach copies to her memorandum.

Utah R. Jud. Admin. 4-501(1)(A) (emphasis added) provides:

> All motions . . . shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of *or citations by page number to relevant portions of depositions*, exhibits or other documents relied upon in support of the motion.[1]

(Emphasis added). Furthermore, Rule 4-501(2)(B) states:

> (B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and *shall specifically refer to those portions of the record upon which the opposing party relies*, and, if applicable,

---

[1]By its terms, Rule 4-501(1)(A) applies only to motions and memoranda in support thereof. Opposing memoranda are addressed in Rule 4-501(1)(B) which states that "[t]he responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation." Plaintiff recognizes that the "supporting documentation" referred to in (1)(B) is defined by (1)(A) and thus the requirements applicable to memoranda in opposition correspond to those for memoranda in support.

> shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(Emphasis added.) This Rule clearly indicates that references to the record are sufficient to support the party's position. Photocopies of the relevant pages are not required to be attached to the document.

Plaintiff's research has discovered no authority requiring that copies of the deposition pages be attached to the Memorandum in Opposition to Defendant's Motion for Summary Judgment. Furthermore, the single authority relied upon by the trial court in support of its ruling does not address this issue. *See Franklin Financial v. New Empire Development Co.*, 659 P.2d 1040 (Utah 1983). The portion of the opinion in *Franklin Financial* which the trial judge quoted in his Memorandum Decision states that "[w]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials" the court may conclude there are no genuine issues of fact unless the moving party's supporting evidence discloses such an issue. *Id.* at 1044. That statement fits the facts of *Franklin Financial*: The party opposing the motion for summary judgment did not file a memorandum in opposition to the motion for summary judgment. *See id.* However, those facts are simply not present in this case. The Plaintiff here filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment. (*See* R. at 0113-0104.) Furthermore,

each factual statement in the memorandum was followed by a specific reference to the deposition in which the asserted fact appeared. (*See* R. at 0112-0109.) Each of those references included the page of the deposition on which the asserted fact appeared. (*See* R. at 0112-0109.)

Judge Harding's memorandum decision could be read to have a different meaning than that discussed above. Judge Harding ruled he could not consider Plaintiff's arguments because Plaintiff "did not provide the Court with a copy of the portions of the depositions which allegedly contained these statements." (*See* R. at 0176.) The excerpt from *Franklin Financial* on which Judge Harding relied, however, refers to the filing of responsive affidavits or other evidentiary materials. Thus, it is possible that Judge Harding was indicating that his ruling was based on the fact that the depositions in this case had not been filed. Any such ruling, however, would clearly be erroneous. Utah R. Civ. P. 5(a)(1) establishes that "except as otherwise provided in these rules" every paper relating to discovery is to be served. Rule 5(d) establishes that "[e]xcept when the rules of judicial administration prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court." Thus, in its entirety, Rule 5 establishes that discovery matters are to be filed with the court except where such filing is prohibited by the Rules of Judicial Administration.

Utah R. Jud. Admin. 4-502(4) states:

> Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of court except as provided in this Code or upon order of the court for good cause shown.

No order requiring the filing of depositions had been entered in this case.

Utah R. Civ. P. 30(f)(1) states:

> (f) *Record of deposition; certification and delivery by officer; exhibits; copies.*
>
> (1) The transcript or other recording of the deposition made in accordance with this rule shall be the record of the deposition. The officer shall sign a certificate, to accompany the record of the deposition, that it was duly sworn and that it is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall securely seal the record of the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send the sealed record to be made. If any party in the action is not represented by an attorney, the record of the deposition shall be sent to the clerk of the court for filing unless otherwise ordered by the court. An attorney receiving the record of the deposition shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

In plain language, this Rule establishes that, unless the court orders otherwise, deposition transcripts are to be safely stored by the attorney who ordered the transcript.

In short, the depositions were filed with the court but stored by the attorney.

An overlapping issue in this case is the fact that a party opposing summary judgment is not required to proffer affidavits or other supporting evidence in order to avoid an entry of summary

judgment against him. *Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984); *Olwell v. Clark*, 658 P.2d 585 (Utah 1982); *see also Town of Alta v. Ben Hame Corp.*, 836 P.2d 797, 805 (Utah Ct. App. 1992).

Here, it was undisputed that the woman described by Freeman as standing talking to the manager was not the Plaintiff. Therefore, no affidavit or other evidence was needed to verify this undisputed fact.

Defendant has never claimed that Plaintiff was the woman who had spilled the soap. Defendant did not contest Plaintiff's argument that Freeman's description of the Plaintiff was, in fact, not the Plaintiff. Thus, a factual argument exists that Freeman witnessed a conversation between Guevara, a store manager, and the customer who caused the spill.

It is uncontested that Plaintiff fell in the front of the store. Freeman ran upon the customer who spilled the soap in the front of the store. Freeman had cleaned the spill, starting at the back of the store. Thus, the customer had made the spill from the back of the store to the front of the store.

By the time Freeman came upon the customer that had spilled the soap, she and the manager were already talking.

Freeman testified it took her several minutes to clean up the spill--after she saw it. Guevara testified employees would pass over the area where the spill was located every five minutes.

These facts together provide ample basis for a jury to question the reasonableness of the Defendant's behavior.

This case involves circumstantial evidence. A Utah jury can find negligence on the part of the Defendant based strictly on circumstantial evidence. Even a criminal verdict, based on the "beyond a reasonable doubt" standard, can be based on circumstantial evidence. *John Q. Hammons, Inc. v. Poletis*, 954 P.2d 1353 (Wyo 1998) and *Lohse v. Faultner*, 860 P.2d 1306 (Az 1992).

In short, controlling Utah authority establishes that Plaintiff was not required to attach copies of the deposition pages on which she relied to her memorandum. This court is not required to grant any deference to a trial court's legal conclusions and, thus, such conclusions are reviewed merely for correctness. *See Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah Ct. App. 1992). Finally, the evidence reviewed in the light most favorable to the Plaintiff clearly raises a jury question. Thus, this court should hold that the trial court erred in stating that the Plaintiff was required to attach copies of the deposition pages on which she relied to her Memorandum in Opposition to Defendant's Motion for Summary Judgment.

Furthermore, it should be remembered that the trial court raised this issue *sua sponte*; Wal-Mart did not object to the absence of the copies. After Plaintiff filed her Memorandum in Opposition to Defendant's Motion for Summary Judgment, Defendant Wal-Mart filed a Memorandum in Reply to that document. (*See* R. at 0167.) Defendant's document addressed only the substantive issues involved in this case; Wal-Mart did not in any way object to

Plaintiff's failure to attach copies of the deposition pages on which she relied to her memorandum.

If Defendant believed that Plaintiff had misrepresented any of the deposition testimony on which she relied, it certainly would have been expected to have called that misrepresentation to the attention of the court in its Memorandum in Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment. Plaintiff could easily have provided copies of the deposition pages to the court at that point. The Defendant's absence of any claim of factual misrepresentation strongly indicates that Defendant recognized that Plaintiff accurately represented the deposition testimony. The absence of any objection also indicates that the Defendant recognized that the identification of the woman Freeman saw talking to Guevara was not Dee Blain and, thus, Plaintiff was not required to offer any support for this fact.

Only after the trial court based its summary judgment ruling on the absence of the copies did Wal-Mart adopt the court's position. In its Memorandum in Opposition to Plaintiff's Rule 60(b) Motion for Relief from Order, Defendant argued that Plaintiff was required to attach the copies to her memorandum. (*See* R. at 0208.) Plaintiff strenuously contends that by failing to have raised this issue before summary judgment was granted, Defendant waived the right to complain of the absence of the page copies. The logic of this position is clear: If Wal-Mart had objected before the matter was decided by the trial judge, the Plaintiff could easily have supplied the copies. By failing to object, Wal-

Mart deprived Plaintiff of the ability to correct the matter by the simple method of amending her Memorandum in Opposition. It is inherently unfair for Defendant to object to the absence of the copies when it did not do so at a time when the matter could have been easily corrected.

Despite its lengthy discussion of this issue in the briefings in the court below, Defendant Wal-Mart did not cite a single authority for the premise that a litigant who cites to deposition testimony in a memorandum is required to append copies of deposition pages on which she relies to memoranda submitted to the court. Instead, the authority on which Wal-Mart relied involved situations in which the litigants failed to provide any support whatsoever for their positions. Defendant fails to recognize that Plaintiff herein did provide support for her assertions; she provided that support by referring to the proper pages in the depositions, as authorized by Utah R. Jud. Admin. 4-501(1)(A). Thus, authorities addressing situations in which litigants did not respond or present any argument to the court are simply irrelevant here.

II. THE TRIAL COURT ERRED IN GRANTING THE **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. THE EVIDENCE CONTAINED IN THE DEPOSITION PAGES WHICH THE DEFENDANT SUPPLIED TO THE TRIAL COURT RAISES A MATERIAL QUESTION OF FACT AS TO THE DEFENDANT'S NEGLIGENCE.**

Assuming arguendo that copies of deposition pages cited in a litigant's memorandum to the court should be attached to that document, the court nevertheless erred in granting summary judgment. The evidence which was before the court establishes that a material question of fact as to the Defendant's negligence was raised by the evidence contained in the deposition pages on which the Defendant relied. It is well established that a motion for summary judgment should be granted only when it is clear from the undisputed facts that the party opposing the motion cannot prevail. *See Lach v. Deseret Bank*, 746 P.2d 802 (Utah Ct. App. 1987). In considering a motion for summary judgment, a trial court must evaluate all the evidence and all reasonable inferences which may fairly be drawn from the evidence in the light most favorable to the nonmoving party. *Id.*

> Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility.

Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d at 1261 (footnote omitted); *see also Webster v. Sill*, 675 P.2d 1170 (Utah 1983) (a trial court deciding a motion for summary judgment may not weigh the evidence or assess

credibility). Any doubt regarding whether a nonmovant has established a genuine issue of material fact should be resolved in favor of permitting the party to go to trial. *Butterfield v. Okubo*, 831 P.2d 97 (Utah 1992). A genuine question of fact exists when reasonable minds could differ on whether the Defendant's conduct satisfied the required standard. *Jackson v. Dabney*, 645 P.2d 613 (Utah 1982).

On appeal from an order granting summary judgment, the appellate court does not defer to the trial court's determination of whether there are disputed material facts. Instead, it reviews the facts and inferences in the light most favorable to the losing party and resolves any doubts or uncertainties in the favor of that party. *Canfield v. Albertsons, Inc.* By definition, cases decided on summary judgment involve only questions of law, not questions of fact. *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991). Thus, only conclusions of law are presented for appellate review, and the appellate court is not required to grant any deference to the conclusions reached below. *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933 (Utah 1997); *Schurtz v. BMW of North America, Inc.* Instead, the standard for review by an appellate court is the same as it was for the trial court. *English v. Kienke*, 774 P.2d 1154 (Utah Ct. App. 1989), *aff'd*, 848 P.2d 153 (Utah 1993). If the appellate court determines that a question of fact exists, the summary judgment will be reversed and the case remanded. *Id.* Summary judgment is particularly inappropriate in negligence actions. *Id.*

> [S]ummary judgment should be granted with great caution where negligence is alleged. *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 615 (Utah 1985). This is because "[i]ssues of negligence ordinarily present questions of fact to be resolved by the fact finder." *Id.* "It is only when the facts are undisputed and but one reasonable conclusion can be drawn therefrom that such issues become questions of law." *Id.* Accordingly, summary judgment is reserved for only the most clear-cut negligence cases.

774 P.2d at 1156.

The trial judge appears to have ignored the fact that many of the pages relied upon by the Plaintiff in her opposing Memorandum were also cited by the Defendant in its Memoranda. Thus, the court had copies of the pertinent deposition pages. The Plaintiff strenuously contends that the facts contained in the deposition pages attached to the Defendant's Trial Memoranda, and the inferences fairly drawn from those facts, raise a material question of fact regarding the Defendant's negligence.

The testimony of the Plaintiff contained in deposition pages attached to Defendant's memorandum establishes the following. Plaintiff remained on the floor for 10 to 15 minutes after she became aware of what was going on after the fall. (R. at 0083.) Plaintiff does not know if she lost consciousness when she fell, but states that she "was stunned or something because" she does not remember hitting the floor. (R. at 0085.)

The deposition testimony of Plaintiff's daughter, Sheri Anderson, contained in the Defendant's Trial Memoranda establishes that Anderson heard a Wal-Mart employee state that the substance on which her mother fell had been spilled from the back of the store to the front of the store. (R. at 0079.) She heard that statement

a minute or so after her mother fell. (R. at 0079.) The statement was made while two female Wal-Mart employees, as well as Anderson, and Troy Guevara were standing around Plaintiff, who remained on the floor. (R. at 0079.)

Defendant's Trial Memoranda also contained excerpts from Melia Lei O'Hawaii White Freeman, the Wal-Mart employee who cleaned up the spill. That evidence showed Freeman was working in one of the store aisles when she saw a couple of spots on the floor. (R. at 0074.) She grabbed some paper towels and wiped up the spots that she saw. (R. at 0074.) As she wiped up those spots, she saw one or two more spots. (R. at 0073.) She stated that this pattern continued until she reached the place where Plaintiff had fallen. (R. at 0073.) When she reached the place where Plaintiff had fallen, a store manager was already there. (R. at 0073.) Freeman stated that when she turned the corner from the aisle where she had been working and entered the main aisle in which Plaintiff had fallen she saw that the spill "was something more than a couple little drops. But I had no idea." (R. at 0072.) Freeman testified that the drops she followed from the area in which she was originally working to the place where Plaintiff had fallen were part of the same spill. (R. at 0071.) Freeman also testified that it was "quite a ways" from the place where she first noticed the drops to the place where the Plaintiff fell. (R. at 0070.) She also stated that the area in which the spill occurred was a high traffic area. (R. at 0068.) Freeman did not see any other employees while she was cleaning up the spill. (R. at 0119.)

Freeman stated that frequently a spill will first be noticed by a customer, who asks a Wal-Mart employee to clean up. (R. at 0119.) Freeman stated that the instructions given to Wal-Mart employees regarding cleaning up spills were that the employee who found the spill should clean it up, or call to another Wal-Mart employee to clean it, or to have a customer go get another employee. (R. at 0119.) Freeman did not see any other Wal-Mart employees as she was cleaning up the spill. (R. at 0119.) When she was asked whether she requested a customer to summon another Wal-Mart employee to help with the spill, Freeman responded, "I didn't feel that it was necessary because I had the paper towels and it wasn't that—that great of a spill." (R. at 0118.) She further explained, "And if I—if I conversed with a customer, then I probably would have gotten swarmed by some more customers asking me for something. Customers are always looking for somebody to help them. So I just stayed content on cleaning up what I could see." (R. at 0118.) She also stated:

> I may have even taken my smock off to clean it up so that nobody even knew I was a employee to stop me.
>
> Q. Is that something you would do now and then to avoid that problem?
>
> A. Sometimes, yeah, like if you had to get to do something. But I usually kept it in my back pocket. I never hid it. It was always there, and the employees knew who I was so —[.]

(R. at 0118.)

Freeman's testimony regarding the scene when she reached the area in which the manager was standing is as follows:

Q. All right. Let me take you to that point for a moment. You mentioned to us as you came around the corner of the last aisle you saw—I guess you saw my client on the floor?

A. Yeah. Well, no, I didn't see her on the floor. I saw her standing up.

Q. All right.

A. I got around the corner when she was standing there and talking to the manager.

Q. But you were able to put together that she had fallen on the material?

A. Yeah. Something—yeah. Something had happened for there to be a manager.

(R. at 0127.)

Freeman also testified that she believed that the customer she saw talking to the manager was the same person who had caused the spill and that she was also the person who had fallen and been injured. (R. at 0126-0125.) Freeman saw this woman only when the woman was standing and talking to the manager. (R. at 0125.) Freeman did not see her in any other position. (R. at 0125.) Freeman testified that, once she approached the manager and the woman, she saw a dripping bottle in the woman's shopping basket. (R. at 0123.)

The Wal-Mart manager who spoke with Plaintiff immediately after she fell was Troy Guevara, who testified as follows in the deposition pages attached to Defendant's Trial Memoranda. Guevara stated that the liquid on which the Plaintiff fell had come from a bottle which had been placed in a shopping cart by a customer who left a trail of liquid all through the store. (R. at 0147.) Guevara testified as follows:

A. Well, I remember later, whoever it was that came up said, "Troy, I followed that thing all the way around the store."

Q. Okay.

A. And I said, "Wow, that's a pretty good spill."

(R. at 0145.) Guevara also testified that the spill was located in areas which Wal-Mart employees cross over "every five minutes or so." (R. at 0143.) He testified that he would have expected the employees to see the spill when they crossed the areas in which it was located. (R. at 0143.)

Taken together and without considering any other evidence, the testimony contained in the deposition pages attached to the Defendant's Trial Memoranda establishes that the spill on which Plaintiff fell extended from the area in which Freeman worked to the front of the store near the checkout stands. Freeman testified that the spill extended for "quite a ways" through a high traffic area. Nevertheless, Freeman apparently discovered the spill solely by accident. No other Wal-Mart employee had noticed the spill or, if they had seen it, taken any efforts to clean it up.

Boiled down, Wal-Mart's Motion for Summary Judgment was based on a single argument, namely, that it did not have actual or constructive knowledge of the spilled detergent in time to clean up the spill before Plaintiff fell. (*See* R. at 0096, 0094.) The evidence upon which Wal-Mart relied for this argument was, when construed according to Wal-Mart's interpretation, that the Wal-Mart employee who cleaned up the spill did not know of the spill until

after the Plaintiff had fallen. (*See* R. at 0096, 0094.) Wal-Mart itself summarized its argument as follows:

> Under this scenario, there is no way that Ms. Freeman could have cleaned the spill before Plaintiff's fall because she simply didn't observe the spill until after the fall occurred.

(R. at 0094.)

Wal-Mart's argument misses the point: the time at which it, through one of its employees, found the spill is irrelevant. The critical point is the one at which Wal-Mart *should have* discovered the dangerous condition. A property owner will be held liable for injuries caused by a dangerous condition on his property when he knew or should have known of the condition. See *Koer v. Mayfair Markets*, 19 Utah 2d 339, 431 P.2d 566 (1967); *Canfield v. Albertsons, Inc.; Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623 (Utah Ct. App. 1991). Here, Freeman located the customer that caused the spill in the front of the store. Plaintiff fell in the front of the store. Wal-Mart employees could have and should have noticed the spill before the customer managed to walk the entire length of the store. The law imposes liability on property owners not only for injuries caused by dangerous conditions of which they knew, but also for such conditions of which they *should have known*.

Plaintiff contends that the evidence contained in the deposition pages attached to the Defendant's Trial Memoranda and the reasonable inferences which may be drawn therefrom establish that Wal-Mart had sufficient constructive notice of the spilled

detergent on which Plaintiff fell for it to be held liable for her injuries[2].

The jury's evaluation of Freeman's credibility is critical to this case. Freeman testified based on the assumption that the woman she saw speaking to the store manager was both the victim of the fall and the person who had spilled the liquid detergent. Freeman apparently based her assumption solely on her belief that something bad had to have happened for a manager to be talking to a customer. A jury may be particularly persuaded by the fact that Freeman readily admitted that she found the necessity of assisting customers to be a distraction and that she sometimes removed her smock, which identified her as a Wal-Mart employee, in order to avoid having to interact with customers. The jury might infer that

---

[2]Freeman's description of the woman she saw at the front of the store was not Dee Blain. Therefore, Dee Blain fell either before Freeman approached this customer or after Freeman returned to her department after she fell. Plaintiff testified she was on the floor for 10 to 15 minutes. If Plaintiff fell before Freeman ran into the customer that caused the spill, and Freeman did not see Plaintiff while cleaning up the spill, it can be confirmed the spill was on the floor for some time.

If Plaintiff fell after Freeman seemingly cleaned up the spill and went back to her department, Freeman acted negligently in failing to properly clean the spill.

If a jury were to find that the woman Freeman saw was the plaintiff, then some time passed between plaintiff's fall and Freeman arriving at the scene. Plaintiff said she was on the floor for 10 to 15 minutes. Freeman said the woman she saw was standing talking to the manager.

The manager admitted that, because of the location of the spill, the store's employees should have discovered it within five minutes. Nevertheless, Freeman claims she constantly followed the trail of soap but did not arrive at the place where she allegedly saw Dee Blain while the plaintiff was sitting on the floor.

Freeman also avoided other aspects of her job, such as looking for safety hazards and promptly cleaning up spills which she did see that presented dangers to customers. The jury might also find that the absence of Freeman's smock on the day in question could have prevented a customer from reporting the spill to her before she discovered it. These possibilities are obviously inferences from the depositions, but they illustrate the importance of having a jury determine questions of negligence. *See generally Silcox v. Skaggs Alpha Beta, Inc.* In short, a jury should be permitted to determine whether Blain fell before Freeman saw the woman who had caused the spill talking to Guevara. Furthermore, a jury should be permitted to determine whether Freeman found and cleaned the spill improperly. A jury could also find that another Wal-Mart employee should have found and eliminated the spill before Freeman did. In other words, a jury should be permitted to determine whether the negligence of Wal-Mart's employees in failing to find and eliminate the spill in a timely manner caused Plaintiff's fall and injuries.

Freeman's testimony does not in any way establish the amount of time which elapsed between the time she discovered the spill and the time the Plaintiff fell. Even more importantly, however, the time at which the spill was actually discovered is not determinative of the Defendant's liability. Defendant's manager stated that his employees should have discovered the spill within five minutes. Plaintiff was on the floor, at the terminal point of the spill, for up to 15 minutes. During that time, no Wal-Mart

employee discovered the spill and attempted to clean it up. Thus, the testimony of Defendant's own manager establishes, at the very least, that a jury question was stated regarding the negligence of the Defendant in failing to promptly find and correct the dangerous condition.

Even if only the deposition testimony contained in the pages which were provided to the trial court by the Defendant are considered, it is clear that a genuine question of material fact regarding the Defendant's negligence is presented.

Plaintiff has a right to a jury hearing the facts and testimonies of the parties. This is not a case where such right should be taken from the Plaintiff in a summary judgment process.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT PLAINTIFF'S MOTION UNDER UTAH R. CIV. P. 60(B). PLAINTIFF'S FAILURE TO ATTACH COPIES OF DEPOSITION PAGES ON WHICH SHE RELIED WAS BASED ON A REASONABLE READING OF THE PLAIN LANGUAGE OF CONTROLLING UTAH AUTHORITY AND BECAUSE THE ABSENCE OF THE COPIES DID NOT IN ANY WAY PREJUDICE THE DEFENDANT.

This court reviews a trial court's denial of a motion under Utah R. Civ. P. 60(b) for an abuse of discretion. *See Larsen v. Collina*, 684 P.2d 52 (Utah 1984). The United States Court of Appeals for the Fifth Circuit addressed the showing which must be made in order to show an abuse of discretion under the corresponding federal rule in *Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980). That court stated:

> Plaintiff's Rule 60(b) Motion must be equitably and liberally applied to achieve substantial justice. Doubt

> should be resolved in favor of a judicial decision on the merits of a case, and a technical error or a slight mistake by plaintiff's attorney should not deprive plaintiff of an opportunity to present the true merits of his claims. The countervailing factors are the defendants' and society's interests in the finality of judgments and the avoidance of prejudice. *Roberts v. Rehoboth Pharmacy, Inc.*, *supra*, 574 F.2d at 847-48; *Fackelman v. Bell*, 564 F.2d 734, 735-36 (5th Cir. 1977). The plaintiff should not be punished for his attorney's mistake absent a clear record of delay, willful contempt or contumacious conduct.

Id. at 940.

The facts in Blois showed that the plaintiff's attorney in that case neglected to inform the court of a new address for his office. The Defendant's motion for summary judgment was mailed to the old address, and the plaintiff's attorney did not receive it until the time to file an answer had passed. The court granted a default summary judgment upon the plaintiff's failure to file an answer within the specified time. The plaintiff then sought relief under Rule 60(b). After making the comments quoted above, the trial court further stated

> The appellate record and the parties' briefs in this case indicate no prejudice from the short delay in filing plaintiff's cross-motion for summary judgment and the accompanying memorandum in response to the defendants' motion for summary judgment. The events leading up to this failure by plaintiff's attorney to file a timely answer also do not show any willful misconduct or other extreme or unusual circumstances. Hassenflu v. Pyke, supra, 491 F.2d at 1095 and n.3. Plaintiff's attorney merely neglected to file a notice of his change of address with the district court. This neglect, and the untimely forwarding of the copy of the defendants' motion for summary judgment from the old address of plaintiff's attorney combined to deprive plaintiff of a judicial decision on the merits. We do not condone the neglect of plaintiff's counsel. The plaintiff, however, should not have to pay with the loss of his cause of action for his attorney's minor mistake without clear proof of

> serious misconduct and prejudice. Neither exists in this case.
>
> Thus, the district court abused its discretion by refusing to vacate its final entry of default summary judgment.

Id.

Plaintiff contends, as has been discussed in detail above, that she was not required by Utah law to attach copies of the deposition pages on which she relied to her Memorandum in Opposition to Defendant's Motion for Summary Judgment. Briefly restated, Plaintiff, through her attorney, relied on Utah R. Jud. Admin. 4-501(A) in citing to the appropriate pages of the depositions. She was, and continues to be, unaware of any authority contradicting that rule and requiring that copies of deposition pages be attached to the document she presented to the court. Even if this court now holds that the copies should have been attached, Plaintiff asks the court to recognize that her interpretation of Utah law was completely reasonable, and, thus, a finding by the trial court of "willful misconduct or other extreme or unusual circumstances" was precluded.

Furthermore, there was absolutely no prejudice to the Defendant from the absence of copies of the depositions. Indeed, the Defendant did not even object to the absence of the copies in the trial court. Finally, it should be remembered that the trial judge failed to consider the evidence contained in the deposition pages cited by Defendant, copies of which were attached to the Defendant's Trial Memoranda. The trial judge's failure to consider this evidence suggests that he may have acted in haste in ruling,

sua sponte, that he would not consider Plaintiff's argument because he did not have copies of the deposition pages to which Plaintiff cited. Plaintiff asks this court to rule that in the absence of a showing of willful misconduct by the moving party and prejudice to the opposing party the trial judge's refusal to grant Plaintiff's motion under Rule 60(b) was an abuse of discretion.

CONCLUSION

For all the reasons discussed above, Plaintiff/Appellant Dee Blain requests that this court REVERSE the summary judgment entered by the trial court.

Respectfully submitted,

G. Steven Sullivan, Esquire
Robert J. DeBry & Associates
4252 South 700 East
Salt Lake City, Utah 84107
(801) 262-8915

Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellant's Brief was mailed, postage prepaid, on the 12 day of October, 1999, to the following:

Stephen G. Morgan, Esquire
Mitchel T. Rice, Esquire
Morgan & Hansen
Attorneys for Defendant Wal-Mart Stores, Inc.
136 South Main Street, # 800
Salt Lake City, Utah 84101

G. Steven Sullivan
Attorney for Appellant

ADDENDUM

Memorandum Decision

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

DEE BLAIN, Plaintiff, vs. WAL-MART STORES, INC., Defendant.	**MEMORANDUM DECISION** CASE NO. 970400626 DATE: February 8, 1999 JUDGE: RAY M. HARDING DEPUTY CLERK: Georgia Snyder LAW CLERK: Dave Backman

This matter came before the Court upon Defendant's Motion for Summary Judgment. Having received and considered the Motion, together with memoranda in support of and opposition to the Motion, the Court hereby grants the Motion and delivers the following Memorandum Decision.

Statement of Facts

Plaintiff was injured when she slipped and fell on a liquid detergent spill as she was approaching the cashier stands at the Wal-mart in Orem. Melia Lei O'Hawaii White Freeman, a Wal-mart department manager, testified in her deposition that she had been cleaning the spill for a minute or two when she turned a corner in an effort to continue to clean the spill trail and found Plaintiff standing and talking to Troy Guevera, a Wal-mart assistant manager, after the injury. Plaintiff testified in her deposition that she remained on the floor for ten to fifteen minutes after the fall.

Opinion of the Court

Summary judgment is proper only if there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." URCP 56(c). The Court must view the facts in the light most favorable to the non-moving party. Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993).

In a slip and fall caused by a temporary hazard,

> it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it. Schnuphase v. Storehouse Markets, 918 P.2d 476 (Utah 1996).

The Court finds that there is no evidence that Defendant had knowledge of the liquid detergent spill until after Plaintiff's injury. There is also no evidence that the spill had existed for a long enough time that Defendant had constructive knowledge of it. Ms. Freeman testified in her deposition that she had been cleaning the spill for one to two minutes when she discovered Plaintiff standing and talking to assistant manager Guevera after the injury. Plaintiff testified in her deposition that she remained on the floor for ten to fifteen minutes after the fall. Since Plaintiff was standing when Ms. Freeman found her talking to Mr. Guevera, Defendant did not have knowledge of the spill until several minutes after the fall.

Plaintiff argues that it is disputed whether Defendant had knowledge of the spill before her fall since she testified in her deposition that she was still lying on the floor when she talked to Mr. Guevera and because Ms. Freeman's description in her deposition of the person she found standing and talking to Mr. Guevera was obviously of another woman. However, the Court cannot consider these arguments since Plaintiff did not provide the Court with a copy of the portions of the depositions which allegedly contain these statements.

> [W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the

moving party is entitled to judgment. Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983).

Since Defendant's Motion and supporting portions of depositions do not affirmatively disclose the existence of a genuine issue of material fact, the Court has no supporting factual basis for it to consider Plaintiff's arguments.

Order

Accordingly, Defendant's Motion for Summary Judgment is hereby granted.

DATED this 9 day of February, 1999.

BY THE COURT:

RAYM. HARDING, JUDGE

cc: G. Steven Sullivan, Attorney for Plaintiff
Stephen G. Morgan, Attorney for Defendant
Mitchel T. Rice, Attorney for Defendant